Supreme Court, U.S.
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No. 05-746

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

TIMOTHY SORRELL,
Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals

REPLY BRIEF

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RULE 29.6 STATEMENT

Norfolk Southern Railway Company has a parent company, the Norfolk Southern Corporation, which is publicly traded. No other publicly held company owns more than 10% of petitioner's stock.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iv

REPLY BRIEF 1

CONCLUSION 10

TABLE OF AUTHORITIES

CASES Page

Adams v. *Robertson*, 520 U.S. 83 (1997) 9
Brady v. *Southern Ry.*, 320 U.S. 476 (1943) 5
Brady v. *Terminal R.R. Ass'n*, 303 U.S. 10 (1938) 5
Brown v. *Western Ry. of Ala.*, 338 U.S. 294 (1949) 5
Caplinger v. *Northern Pac. Terminal*, 418 P.2d 34 (Or. 1966) 1
Campbell v. *Louisiana*, 523 U.S. 392 (1998) 9
Carter v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430 (1949) 5
Chapman v. *Union Pac. R.R.*, 467 N.W.2d 388 (Neb. 1991) 7
Coray v. *Southern Pac. Co.*, 335 U.S. 520 (1949) 5, 6
Cornet & Zeibig, Inc. v. *430 Withers Realty Co.*, 415 S.W.2d 751 (Mo. 1967) 9
Cuyler v. *Sullivan*, 446 U.S. 335 (1980) 8
Davis v. *Kennedy*, 266 U.S. 147 (1924) 5
Davis v. *Wolfe*, 263 U.S. 239 (1923) 5
Director, OWCP v. *Newport News Shipbuilding*, 514 U.S. 122 (1995) 3
Dixon v. *Penn Cent. Co.*, 481 F.2d 833 (6th Cir. 1973) 1
Fashauer v. *New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269 (3d Cir. 1995) 1, 2, 5
Fletcher v. *Union Pac. R.R.*, 621 F.2d 902 (8th Cir. 1980) 7
Ganotis v. *New York Cent. R.R.*, 342 F.2d 767 (6th Cir. 1965) 1
Gardner v. *CSX Transp., Inc.*, 498 S.E.2d 473 (W. Va. 1997) 7
Hines v. *Sweeney*, 201 P. 165 (Wyo. 1921) 6
Holbrook v. *Norfolk S. Ry.*, 414 F.3d 739 (7th Cir. 2005) 7

TABLE OF AUTHORITIES—continued

Page

Johnson v. *Offshore Express, Inc.*, 845 F.2d 1347 (5th Cir. 1988) 7, 9
Lang v. *New York Cent. R.R.*, 255 U.S. 455 (1921) 5
Lyles v. *Alabama State Docks Terminal Ry.*, 730 So. 2d 123 (Ala. 1998) 7
Marazzato v. *Burlington N. R.R.*, 817 P.2d 672 (Mont. 1991) 7
McCalley v. *Seaboard Coast Line R.R.*, 265 So. 2d 11 (Fla. 1972) 7
McKnett v. *St. Louis & S.F. Railway*, 292 U.S. 230 (1934) 10
Minneapolis, St. Paul & Sault Ste. Marie Ry. v. *Goneau*, 269 U.S. 406 (1926) 5
New York Cent. R.R. v. *Ambrose*, 280 U.S. 486 (1930) 5
New York Cent. R.R. v. *Winfield*, 244 U.S. 147 (1917) 1
New York, Chi. & St. Louis R.R. v. *Niebel*, 214 F. 952 (6th Cir. 1914) 6
Nicholson v. *Erie R.R.*, 253 F.2d 939 (2d Cir. 1958) 7
Norfolk & W. Ry. v. *Ayers*, 538 U.S. 135 (2003) 4
Norfolk & W. Ry. v. *Earnest*, 229 U.S. 114 (1913) 10
Northwestern Pac. R.R. v. *Bobo*, 290 U.S. 499 (1934) 5
O'Donnell v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384 (1949) 5
Oglesby v. *Southern Pac. Transp. Co.*, 6 F.3d 603 (9th Cir. 1993) 7
Orchelle v. *CSX Transp., Inc.*, 574 So. 2d 749 (Ala. 1990) 7
Page v. *St. Louis S.W. Ry.*, 312 F.2d 84 (5th Cir. 1963) 7

TABLE OF AUTHORITIES—continued

Page

Page v. *St. Louis S.W. Ry.*, 349 F.2d 820 (5th Cir. 1965) 1, 2, 4
Reed v. *Pennsylvania R.R.*, 171 N.E.2d 718 (Ohio 1961) 7
Reed v. *Philadelphia, Bethlehem & New England R.R.*, 939 F.2d 128 (3d Cir. 1991) 7
Rodriguez de Quijas v. *Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) 6
Rogers v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957) 5, 6
Snipes v. *Chicago, Cent. & Pac. R.R.*, 484 N.W.2d 162 (Iowa 1992) 7
St. Louis, Iron Mountain & S. Ry. v. *McWhirter*, 229 U.S. 265 (1913) 5
St. Louis-S.F. Ry. v. *Mills*, 271 U.S. 344 (1926) 5
St. Louis S.W. Ry. v. *Dickerson*, 470 U.S. 409 (1985) 1, 2, 3, 10
Street v. *New York*, 394 U.S. 576 (1969) 9
Strobel v. *Chicago, Rock Island & Pac. R.R.*, 96 N.W.2d 195 (Minn. 1959) 7
Summers v. *Missouri Pac. R.R. Sys.*, 132 F.3d 599 (10th Cir. 1997) 7
Swinson v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529 (1935) 5
Tennant v. *Peoria & Pekin Union Ry.*, 321 U.S. 29 (1944) 5, 6
Tiller v. *Atlantic Coast Line R.R.*, 318 U.S. 54 (1943) 5
Ulfik v. *Metropolitan-N. Commuter R.R.*, 77 F.3d 54 (2d Cir. 1996) 7
Urie v. *Thompson*, 337 U.S. 163 (1949) 3, 5

TABLE OF AUTHORITIES—continued

Page

STATUTES AND CONSTITUTION

45 U.S.C. § 51 4
45 U.S.C. § 53 4
Mo. Const. art. V, § 10 9

RULE

Mo. Sup. Ct. R. 83.09 9

SCHOLARLY AUTHORITY

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 9

REPLY BRIEF

In its Petition, Norfolk Southern Railway Company (NS) demonstrated that the ruling below, which enforced mandatory state jury instructions approved by the Missouri Supreme Court (MAI), stands squarely in conflict with the decisions of four courts of appeals and one state supreme court. Pet. 12-15. Sorrell concedes the split, Opp. 3, and helpfully notes that the split is actually deeper, *id.* at 6-7. Moreover, the decision below is separately in plain conflict with *St. Louis S.W. Ry.* v. *Dickerson*, 470 U.S. 409 (1985) (per curiam). Contrary to Sorrell's claims, *Dickerson* forbade state courts to rely upon Missouri jury instructions in disregard of federal law, not solely federal law established by prior decisions of this Court. This Court should grant review to resolve the conflicts on important issues of federal law where uniformity is paramount to protect the balance of interests between railroads and their employees.

1. The rule below, based on a mandatory jury instruction issued by the Missouri Supreme Court, requires defendant employers under FELA to meet a higher threshold in proving an employee's *comparative negligence* than the employee must meet in the first instance in demonstrating the employer's *negligence*. MAI 24.01, 32.07(B) (Pet. App. 35a-36a). That rule conflicts squarely with decisions of the Third, Fifth, and Sixth Circuits and the Oregon Supreme Court. *Fashauer* v. *N.J. Transit Rail Operations, Inc.*, 57 F.3d 1269, 1282 (3d Cir. 1995); *Dixon* v. *Penn Cent. Co.*, 481 F.2d 833, 835 (6th Cir. 1973); *Page* v. *St. Louis S.W. Ry.*, 349 F.2d 820, 823 (5th Cir. 1965); *Ganotis* v. *N.Y. Cent. R.R.*, 342 F.2d 767, 768-69 (6th Cir. 1965); *Caplinger* v. *N. Pac. Terminal*, 418 P.2d 34, 35-36 (Or. 1966). Sorrell candidly concedes the existence of the conflict, Opp. 3, 6, finding no support for Missouri's extreme minority rule except in a single decision of the Texas Court of Civil Appeals and a law review note, *id.* at 6-7. This concession alone justifies this Court's review. FELA is a federal statute that demands a uniform rule. *New*

York Cent. R.R. v. *Winfield*, 244 U.S. 147, 150 (1917).

Laboring mightily to turn his sow's ear into something better, Sorrell argues that the issue does not merit review because it arises infrequently in published decisions. This is simply because the wayward Missouri rule has no support in law or logic to commend it. See *infra* point 3. The issue does not arise anywhere else because the rule of law is so well established. The conflict is square, and permitting a pro-plaintiff rule in Missouri state court is unfair to railroads and promotes forum-shopping under the liberal venue rules of FELA.[1] Moreover, Sorrell is simply incorrect to assert that the authorities contrary to his position employ "little analysis." Opp. 6. The leading decisions amply treat the issue. *E.g.*, *Fashauer*, 57 F.3d at 1282-83; *Page*, 349 F.2d at 825-27. In any event, it is the conflict in the authorities, not the scope of the opinions, that justifies review.

2. The decision below is also flatly in conflict with this Court's decision in *Dickerson*. There, this Court unanimously held that the Missouri Court of Appeals erred when it rejected a FELA defendant's federal-law argument solely because it was foreclosed by Missouri's binding jury instructions. 470 U.S. at 411. Contrary to Sorrell's argument, Opp. 8-9, *Dickerson* in no way turned on whether the Missouri Court of Appeals had affirmatively rejected this Court's precedents.

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[1] Even were it true that this precise issue is litigated infrequently, that is no reason to deny certiorari. The issues of comparative negligence between a railroad and employee, and the proper instructions on causation, are common in FELA cases. Moreover, this is an extraordinarily important issue in St. Louis, where FELA cases are brought with disproportionate frequency. Pet. 16-17 & n.11. To observe this fact is neither "invective" nor "misplaced," Opp. 9 n.4—it is a simple empirical observation that aggressive forum-shopping brings many FELA suits to St. Louis to take advantage of favorable juries and judges, as the sources cited in the Petition indicate. Sorrell lived and worked in northeast Indiana, more than 300 miles from St. Louis, and that is where the accident occurred. His suggestion that he brought this case in St. Louis for the convenience of NS's witnesses, *id.*, is at best disingenuous.

Rather, this Court simply held that "the substantive law governing [FELA cases] is federal" and so must be followed by state courts, no matter what state jury instructions might otherwise require. 470 U.S. at 411. Indeed, in resolving FELA claims, courts apply common law "'as established and applied in the federal courts.'" *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949). This Court is the final expositor of federal common law but federal common law still exists even if this Court has not settled the specific common law rule, and the Missouri Court of Appeals was obliged to apply, based on an analysis of federal common law, the proper causation standards.

In this case, just as in *Dickerson*, the Missouri Court of Appeals relied wholly and exclusively on the existence of an MAI, in utter disregard of federal law. Pet. App. 7a. Contrary to Sorrell's claim, Opp. 9, nothing in the opinion below suggests that the court of appeals relied upon the MAI because it was a correct statement of federal law, see Pet. App. 7a. Rather, the court simply followed the MAI as binding, and in so doing, abrogated NS's federal statutory right to a proper apportionment of damages under the correct causation standards. The Missouri Court of Appeals' exclusive reliance on an MAI that conflicts with FELA warrants summary reversal under *Dickerson*. The fact that the ruling is unpublished from an intermediate court does not insulate it from this Court's review. The rule of law in Missouri is settled by the Missouri Supreme Court's instruction. If the Court denies decision for this reason, it never will have a suitable vehicle for deciding the question presented arising out of Missouri.

3. Sorrell attempts to invent a federal-law rationale for the rule below when the state court stated none, but his arguments fail. He "retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes." *Director, OWCP* v. *Newport News Shipbldg*, 514 U.S. 122, 135 (1995). But the policy and purposes of the Act are not systematically to favor plaintiffs over defendants, as Sorrell presumes, Opp. 5, but to provide a

federal remedy for injured employees according to the rules of the evolving common law, except where there is an "'explicit statutory alteration[].'" *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 145 (2003).

As the Petition demonstrates, the current and longstanding common-law rule is that the same causation standard applies to claims of a defendant's negligence and a plaintiff's contributory negligence. Pet. 9-12 & nn.7-8 (citing, *inter alia*, the Second and Third Restatements of Torts). Nothing in FELA alters this traditional rule. FELA creates liability for the "negligence" attributable to a railroad employer, see 45 U.S.C. § 51, and it diminishes that liability to the extent of the employee's "contributory negligence," *id.* § 53. There is no indication whatsoever that Congress used the term "negligence" to mean different things, or to deviate from common-law principles of causation, in these two closely related and interdependent sections of the same statute.

There is certainly nothing in the statute to indicate that Congress intended to create an unprecedented scheme by which a plaintiff's and a defendant's negligence are to be compared using different metrics. *Page*, 349 F.2d at 824 ("it is obvious that for a system of comparative fault to work, the basis of comparison has to be the same"). Notably, although Sorrell asserts that such a regime theoretically could exist, Opp. 7-8, he cannot identify a single instance in which any jurisdiction has implemented this asymmetrical approach. This is with good reason. Such a system would be difficult to administer, Pet. 12, and it would lead to bizarre and unjust results. For instance, a plaintiff whose conduct was a *more substantial* causal factor in his own injury than the defendant's conduct, and who was *more* at fault, would nonetheless recover full damages. This was not the vision of comparative fault that Congress had in mind; it wanted differences in fault alone, not causation, to govern the apportionment of damages. "[T]o adopt [Sorrell's] argument would be to abandon the clear dictate of the statute in favor of a policy decision to fa-

vor employees over employers." *Fashauer*, 57 F.3d at 1283.

Sorrell claims that divergent causation standards are justified because in his view FELA explicitly authorizes a departure from the federal common-law rule of proximate cause for railroads (without expressly addressing the causation rule for employee contributory negligence), and he faults NS for not addressing the case that he claims establishes that principle (*Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500 (1957)). Opp. 5-6. NS agrees that a determination of the causation standard for railroad negligence is necessary to resolve the question presented, but Sorrell's analysis is off the mark. As the Petition expressly points out, "[t]he predicate rule in Missouri that FELA eliminates the proximate cause requirement for railroad negligence is contrary to federal law," Pet. 14-15 (citing *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923); *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944)).

Sorrell's claim that FELA expressly abrogates the rule of proximate cause for railroads, and that *Rogers* recognized that abrogation, is wrong. The statutory requirement that a railroad may be liable for injury "resulting in whole or in part from" the railroad's negligence, Pet. App. 33a, is fully consistent with the proximate-cause standard. As this Court has repeatedly held, proximate cause is the standard under FELA,[2]

[2] *Brady* v. *S. Ry.*, 320 U.S. 476, 483 (1943); *Davis*, 263 U.S. at 243; *see, e.g.*, *N.W. Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934) (reversing for lack of evidence of proximate cause); *St. Louis-S.F. Ry.* v. *Mills*, 271 U.S. 344, 347 (1926) (same); *Lang* v. *N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921); *see also, e.g.*, *Brown* v. *W. Ry. of Ala.*, 338 U.S. 294, 297-98 (1949); *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 435 (1949); *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949); *Urie*, 337 U.S. at 195; *Coray* v. *S. Pac. Co.*, 335 U.S. 520, 523 (1949); *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 67 (1943); *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 15 (1938); *Swinson* v. *Chi., St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935); *N.Y. Cent. R.R.* v. *Ambrose*, 280 U.S. 486, 489 (1930); *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Goneau*, 269 U.S. 406, 409-10 (1926); *Davis* v. *Kennedy*, 266 U.S. 147, 148 (1924); *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913).

and the statute simply requires that a plaintiff prove that "negligence was the proximate cause in whole or in part" of the injury, *Tennant*, 321 U.S. at 32; *Coray v. Southern Pac. Co.*, 335 U.S. 520, 523 (1949) (the railroad's conduct must be either "the sole or a contributory proximate cause").

Rogers did not overrule, implicitly or explicitly, the many precedents of this Court establishing the federal rule of proximate cause under FELA; indeed, it relied upon them. 352 U.S. at 506 n.11, 507 n.13. *Rogers* simply rejected a particular state common-law conception of "proximate cause" that limited railroad liability to circumstances where its negligence was the "sole, efficient, producing cause of injury." *Id.* at 506. That conception was contrary to the plain language of FELA and this Court's prior precedents. *Rogers* made clear that where the jury could find either the employee's or the railroad's negligence to be a proximate cause of injury, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* If that test is met, "a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." *Id.* at 507. *Rogers* thus applied the longstanding rule that, when the evidence would support a jury finding of other proximate causes, "the railroad company is liable, if its negligence contributes proximately to the injury, no matter how slightly, and no matter how great may be the negligence of the employee." *Hines* v. *Sweeney*, 201 P. 165, 170 (Wyo. 1921); *N.Y., Chi. & St. Louis R.R.* v. *Niebel*, 214 F. 952, 955 (6th Cir. 1914) (a railroad "is liable, if through other employés it is guilty of any causative negligence no matter how slight in comparison to that of plaintiff"). *Rogers* did not *sub silentio* overrule the long line of this Court's FELA cases, as Sorrell contends, Opp. 6, and only this Court has the prerogative to decide whether a later decision abrogated prior precedent. *Rodriguez de Quijas* v. *Shearson/Am. Expr., Inc.*, 490 U.S. 477, 484 (1989).

Conflicts concerning the proper interpretation of *Rogers* and FELA's causation standard constitute more reason, not less, to grant the Petition. Despite this Court's repeated statements that proximate cause is the standard under FELA, see *supra* n.2, there is widespread confusion in the lower courts about this issue. At least eight federal courts of appeals and state supreme courts properly recognize that proximate causation is the rule.[3] In direct conflict, at least seven federal courts of appeals and state supreme courts hold that *Rogers* replaced the rule of proximate cause, and that FELA liability now can arise on a showing of "'featherweight'" causation.[4] A third category of cases holds that *Rogers* did not even speak to the standard of causation under FELA, but dealt instead with multiple causation and the test of a jury case. *Marazzato*, 817 P.2d at 674; *Strobel* v. *Chi., Rock Island & Pac. R.R.*, 96 N.W.2d 195, 199-200 (Minn. 1959). The issue of what standard applies to plaintiff and defendant negligence under FELA is "'predicate to intelligent resolution'" of whether the standards for plaintiff and defendant negligence are the same, *Cuyler* v. *Sullivan*, 446 U.S. 335, 342 n.6 (1980); Opp. 5-6, and so the pervasive confusion on this issue is further reason to grant review.

[3] *Chapman* v. *Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991); *Marazzato* v. *Burlington N. R.R.*, 817 P.2d 672, 674-75 (Mont. 1991); *Reed* v. *Pa. R.R.*, 171 N.E.2d 718, 721-22 & n.3 (Ohio 1961); *see also Reed* v. *Philadelphia, Bethlehem & N. Eng. R.R.*, 939 F.2d 128, 130 (3d Cir. 1991); *Lyles* v. *Ala. State Docks Terminal Ry.*, 730 So. 2d 123, 125 (Ala. 1998); *Gardner* v. *CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997); *Snipes* v. *Chi., Cent. & Pac. R.R.*, 484 N.W.2d 162, 164 (Iowa 1992); *Orchelle* v. *CSX Transp., Inc.*, 574 So. 2d 749, 752 (Ala. 1990).

[4] *Johnson* v. *Offshore Express, Inc.*, 845 F.2d 1347, 1352 (5th Cir. 1988); *see also Holbrook* v. *Norfolk S. Ry Co.*, 414 F.3d 739, 741-42 (7th Cir. 2005); *Summers* v. *Mo. Pac. R R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997); *Ulfik* v. *Metro-N. Commuter R.R.*, 77 F.3d 54, 58 (2d Cir. 1996); *Oglesby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993); *Fletcher* v. *Union Pac. R.R.*, 621 F.2d 902, 909 (8th Cir. 1980); *Page* v. *St. Louis S.W. Ry.*, 312 F.2d 84, 89 (5th Cir. 1963); *Nicholson* v. *Erie R.R.*, 253 F.2d 939, 940 (2d Cir. 1958); *McCalley* v. *Seaboard Coast Line R.R.*, 265 So. 2d 11, 15 (Fla. 1972).

Finally, even if *arguendo Rogers* did lower the threshold for employer negligence under FELA, there is no reason to believe that the threshold for proving a plaintiff's comparative negligence was not likewise lowered. The conflict on that point is squarely presented, and must be resolved even if this Court were to adopt Respondent's reading of the statute.

4. Sorrell further argues that the Court should not take this case because "the facts of [this] case render any [error] irrelevant." Opp. 4. This is no place to argue the facts of the case, but suffice it to say that Sorrell's assertion is pure speculation, and the effect of the erroneous instruction on the jury is wholly unknowable. It assuredly is *not* the case that the jury had to "side entirely with Sorrell or entirely with Woodin," *id.* If this were true, then the trial court could not have given a contributory negligence instruction (to which Sorrell never objected); the only issue would have been railroad negligence. Moreover, there were any number of issues as to which the jury could have believed Sorrell or Woodin in part, and it therefore could have ascribed partial liability to Sorrell under a properly announced contributory-negligence standard. NS presented evidence based on the physical dimensions of the trucks and the roadways that the truck would not have tipped over if Sorrell's testimony were true. The jury could have determined, for instance, that Woodin drove negligently, but that Sorrell negligently pulled over too far to the side of the road, or did not slow down enough, Tr. 458, or swerved too hard and therefore contributed to the accident. It could have credited the accident report that Sorrell filled out on the day of the accident, in which he stated (contrary to his trial testimony), that both drivers got off the road, *id.* at 464. It could have credited Woodin's account, but concluded that his approaching Sorrell caused Sorrell's truck to fall into the ditch, and so both bore some fault. These issues are for a properly instructed jury to determine in the first instance. And, they demonstrate why Sorrell is mistaken to argue that the causation standard is insignificant. The "'featherweight'"

causation standard employed by the court below, *Johnson*, 845 F.2d at 1352, means that very thin evidence can lead to major verdicts (as occurred in this case), and so alterations in the causation standard substantially affect the size of the awards.

5. Whether the issuance of improper jury instructions affected the verdict in this case would not be such guesswork if the court had appropriately instructed the jury to specify its apportionment of fault on the verdict form. Pet. 17-22.[5] The Petition demonstrates—and Sorrell does not contest—that in the absence of a special verdict, it is impossible to determine whether a jury correctly applied FELA's rules concerning contributory negligence. Pet. 18. Sorrell's sole response is to mischaracterize the issue as whether "FELA defendants have a right to intrude into jury deliberations." Opp. 12. Determining whether a jury has faithfully applied its instructions does not "intrude" into the deliberations any more than instructing the jury in the first place. The cases set forth in the

[5] This second issue is not waived. *Cf.* Opp. 10-11. It was raised to, briefed before, and passed upon by, the Missouri Court of Appeals. An issue "must be pursued [in state appellate courts] in the manner and with the degree of specificity required by the state rules of practice," Robert L. Stern et al., *Supreme Court Practice* 179 (8th ed. 2002), and it is black-letter law that on a motion for transfer, the Missouri Supreme Court takes an entire case, not only the issues specially highlighted in the transfer petition. Mo. Const. art. V, § 10; Mo. Sup. Ct. R. 83.09; *Cornet & Zeibig, Inc.* v. *430 Withers Realty Co.*, 415 S.W.2d 751, 753 (Mo. 1967). NS did everything that was required to present this issue to the Missouri Supreme Court, and so "the claim was raised '"at the time and in the manner required by the state law."'" *Adams* v. *Robertson*, 520 U.S. 83, 87 (1997) (per curiam). Sorrell selectively quotes cases concerning the altogether different question of how to determine whether an issue was adequately raised *on the merits* in the state court when the decision under review did not address the issue. Opp. 10; *see Adams*, 520 U.S. at 86; *Street* v. *New York*, 394 U.S. 576, 581-82 (1969). In that context, this Court requires only that the "'petitioner's federal claim ... was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Campbell* v. *Louisiana*, 523 U.S. 392, 403 (1998). Here, that requirement was fully satisfied.

Petition demonstrate that an instruction requiring the jury to specify its apportionment of liability is necessary to vindicate a FELA defendant's right to the proper allocation of damages. This Court has affirmed FELA defendants' right to a proper apportionment, see Pet. 19; *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 121-22 (1913), and the courts of appeals have recognized that it is through special verdict forms that this right is vindicated, Pet. 20-21 & n.12. That some of these courts point to Federal Rule of Civil Procedure 49 as the customary authority for special verdict forms in no way undercuts their relevance. They do not "merely comment" that a special verdict form would have been helpful, Opp. 11; they reverse because the verdict could not be affirmed in the absence of a special verdict form, or recognize that a special verdict is necessary for an appellate court to determine what the jury did.

Notably, Sorrell does not attempt to justify the Missouri Supreme Court's bizarre rule of discriminating against FELA defendants' statutory right to an offset for comparative negligence. Missouri *requires* special verdict forms for comparative negligence in non-FELA cases, but *prohibits* such forms in FELA cases. Pet. 21-22. There is no possible rationale for this rule, and Sorrell offers none. This rule violates the bedrock principle that "[a] state may not discriminate against rights arising under federal law." *McKnett* v. *St. Louis & S.F. Ry.*, 292 U.S. 230, 233 (1934). Moreover, the lower court's implementation of this discriminatory rule was yet again justified by reference to the binding nature of the Missouri jury instructions, with no analysis of what federal law requires, Pet. App. 17a-18a, in further violation of *Dickerson*, 470 U.S. at 411. For this reason, too, this Court's review is warranted.

CONCLUSION

The Petition for a Writ of Certiorari should be granted and the Court may wish to consider summary reversal.

Respectfully submitted,

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